

The issue for Board determination is: did claimant sustain personal injury by accident arising out of and in the course of her employment?

FINDINGS OF FACT

The undersigned Board Member adopts and incorporates herein by reference the findings of fact set forth in the ALJ's preliminary hearing Order, as supplemented by the following findings.

Claimant was hired by respondent as a dietary aide in January 2012. She described her October 26, 2012, accident as follows:

I was taking a pan of pasta out of the oven and when I turned around my back popped, to put it on the table, and that's when the onset of the pain started.¹

Claimant testified a pan of pasta weighed 30-40 pounds and was 2 feet long and 1 foot wide. Removal of a pan from the oven required reaching and twisting at the waist.

Claimant experienced an increase of back and right leg pain in the days following the accident. Respondent referred her to Concentra for medical treatment. Claimant was prescribed muscle relaxants and pain medication. She underwent x-rays and a lumbar MRI scan, received injections, and was provided with physical therapy. Claimant has not worked since the accident because respondent cannot accommodate her temporary work restrictions. Ultimately, claimant was referred to Dr. Alexander Bailey, who recommended a lumbar fusion. Claimant has continued conservative treatment with Dr. Bailey.

At the time of the preliminary hearing, claimant was having numbness of the right leg, pain down the right leg and limited mobility.

On January 27, 2011, about one year before she commenced employment for respondent, claimant underwent an MRI of her lumbar spine due to low back pain and right lower extremity pain. The MRI showed degenerative disk disease involving the mid to lower lumbar spine as well as mild to moderate central spinal canal stenosis at L5-S1, right greater than left. Claimant testified she did not seek medical treatment for her low back or pain down her legs before January 2011.

An MRI of claimant's pelvis performed on April 1, 2011, revealed asymmetric hypertrophy of the right piriformis muscle. In April 2011, claimant had low back surgery performed by Dr. Hilton for a herniated disk at L5-S1. Claimant testified:

¹ P.H. Trans. at 6.

Q. After the 2011 surgery, what happened to your symptoms? How was your back doing?

A. Fine. It went back to normal.

Q. How long did it take after the surgery in April to get back to normal?

A. About three months.

Q. So from the middle of 2011 until you began working with the school district, and then from the time you started with the school district until October of 2012, were you having any back or leg problems at all?

A. No.

Q. Were you working full duty from the time you started with the school district until the day you were injured?

A. Yes.²

On July 18, 2011, an MRI of claimant's lumbar spine with and without contrast was performed due to low back pain radiating down the right leg. The MRI revealed: (1) status post right hemilaminectomy at L5-S1; (2) no focal recurrent disk herniation was seen; (3) degenerative disk disease involving the mid and lower lumbar spine resulting in mild central spinal canal stenosis at L3-4 and L4-5; and, (4) no significant neural foraminal stenosis was seen.

Claimant attended physical therapy sessions on August 30 and September 1, 2011, but was scheduled for additional physical therapy sessions which she cancelled. The sessions claimant cancelled were on September 6, 8, 12 and 14. Claimant was released from treatment on September 30, 2011.

A November 14, 2012, MRI of the lumbar spine indicated claimant had post surgical changes at L5-S1, disk protrusion versus epidural fibrosis at L5-S1, degenerative disk disease and facet arthropathy at L3-4 and L4-5.

Dr. Edward Prostic evaluated claimant on November 20, 2013, at the request of her attorney. X-rays revealed disk space narrowing at L5-S1 and very short pedicles at L5. Dr. Prostic opined claimant sustained a work-related injury on October 26, 2012, consisting

² P.H. Trans. at 16-17.

of a recurrent L5-S1 disk herniation. According to Dr. Prostic, claimant's accident was the prevailing factor in the injury, medical condition and need for medical treatment.³

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(b) and (c) provide:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508 provides in relevant part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . . .

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

³ *Id.*, Cl. Ex. 1 at 2-3.

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(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

The undersigned Board Member agrees with the ALJ claimant has not proven personal injury by accident arising out of and in the course of her employment.

In 2011, claimant developed low back pain and right leg pain. Lumbar MRI scans were conducted before and after claimant underwent low back surgery for a herniated disk at the L5-S1 level by Dr. Hilton in April 2011. Although claimant testified she completely recovered within 3 months following the surgery, the medical records admitted into

evidence at the preliminary hearing clearly show claimant again developed, and was treated for, back and right leg pain before the alleged accident on October 26, 2012.

Claimant had another lumbar MRI scan after the alleged accident and it reflects no evidence of traumatic injury. As with the pre-injury MRIs, there is evidence of degenerative disk disease and degenerative bony abnormalities from L3 to the sacrum.

It is exceedingly difficult to place significant weight on Dr. Prostic's opinions. Dr. Prostic mistakenly reported claimant underwent surgery at L5-S1 in 2008, when the surgery was actually performed in 2011. Dr. Prostic apparently did not have access to medical records relating to claimant's history of pre-injury low back problems, nor had Dr. Prostic evidently been provided with the four MRI reports or the films from those tests. Dr. Prostic's diagnosis of a recurrent L5-S1 disk herniation does not appear to be supported by the November 14, 2012 lumbar MRI scan. Claimant's low back and right radicular symptoms were the same or substantially similar to those experienced by claimant before the alleged accident.

It is a reasonable inference from the preponderance of the credible evidence that any accident claimant sustained was caused by claimant's preexisting injured disk at L5-S1 and claimant's degenerative disease from L3 to the sacrum. The accident was not the prevailing factor causing claimant's injury, medical condition and resulting disability or impairment. If claimant was injured as a result of the alleged accident, the injury solely aggravated claimant's preexisting injured L5-S1 disk, or the degenerative disease, and rendered claimant's preexisting condition symptomatic.

CONCLUSION

This Board Member finds the ALJ did not err in concluding claimant did not sustain personal injury by accident arising out of and in the course of employment, and that claimant did not prove the alleged accident was the prevailing cause of the injury, medical condition and resulting disability or impairment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁵

⁴ K.S.A. 44-534a.

⁵ K.S.A. 2012 Supp. 44-555c(k).

WHEREFORE, the undersigned Board Member finds that the December 12, 2013, preliminary hearing Order entered by ALJ Kenneth Hursh is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of February, 2014.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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Hon. Kenneth Hursh, ALJ